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In The

# Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

*Petitioner*

vs.

AETN-TV, KHOG-TV, *et al.*,

*Respondents*

**On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit**

## APPENDICES - I

Ralph P. Forbes,
*Citizen In His Own Proper Person*
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# APPENDIX: Volume I



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## APPENDIX A
## UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT

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No. 93-1031WA

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Ralph P. Forbes, and the People, *Appellant,*

v.

Arkansas Educational Television Communications Network Foundation, and its Board of Directors in their official capacities; Arkansas Education Telecommunications, and its members and officers; Susan J. Howarth, in her official capacity as Executive Director; Victor Fleming, in his official capacity as Chairman; G.E. Campbell, in his official capacity as Vice-Chairman; Dr. Caroline Whitson, in her official capacity as Secretary; Diane Blair, in her official capacity as Commissioner; S. McAdams, in his official capacity as Commissioner; James Ross, in his official capacity as Commissioner; Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager;

On Appeal from the United States District Court for the Western District of Arkansas

Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does; KHBS TV/Channel 40 UHF; KHOG TV/Channel 29 UHF; American Broadcasting Company; Darrel Cunningham, in his individual capacity,
*Appellees.* ⊥2 *

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Submitted: August 31, 1993

Filed: April 28, 1994

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Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

---

RICHARD S. ARNOLD, Chief Judge.

The petitioner, Ralph Forbes, appeals the District court's dismissal of his complaint for failure to state a claim upon which relief can be granted. Forbes raises two issues. First, does a private television station violate the Federal Communications Act by deciding to air a political advertisement during "safe harbor" hours without first determining whether that ad is "indecent"? Second, does a political candidate who has qualified to be on the ballot have a right to be included in a debate sponsored by a public television station or, in the alternative, a right to equal access under 47 U.S.C. § 315,[1] when the other candidates are ⊥3 included? Relying on this Court's holding in *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), the District Court concluded that neither claim had merit, that the Communications Act cannot be enforced through a § 1983 action, and that Forbes had failed to state a claim under 42 U.S.C. § 1981, § 1985, or the First and Fourteenth Amendments. We now affirm in part and reverse in part.

I.

In 1992, Ralph Forbes was an independent candidate for United States Representative for the Third congressional District of Arkansas. He had obtained enough signatures to qualify for the ballot under state law. One of the defendants, the Arkansas Educational Television Network (AETN), is an instrumentality of the State of Arkansas. The other defendants are private television stations that broadcast in the Third congressional District.

A few weeks before the general election on November 3, 1992, Forbes sued AETN and its agents (collectively the AETN defendants) alleging that AETN planned to sponsor a debate among the candidates for the Third congressional District seat, but that it intended to include only the two major-party candidates. Forbes alleged that since he had qualified for the ballot as an independent candidate, he had a right to be included in the debate or, in the alternative, a right to additional air time on AETN to express his views, as required by the equal-time provision of 47 U.S.C. § 315. He claimed that AETN had denied him access to air time because of his

---

1 47 U.S.C. § 315(a) provides that any person legally qualified as a candidate for public office shall be afforded the same opportunities as all other candidates for that office. However,

> No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary . . . or
> (4) on-the-spot coverage of bona fide news events . . .
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

47 U.S.C. § 315(a).

political beliefs. Forbes also alleged that AETN's actions were taken in violation of 42 U.S.C. § 1981 *et seq.*; and that his First Amendment rights had been violated. Finally, Forbes alleged that his exclusion from the debates had deprived "the people" of their right to vote, and he sought declaratory and injunctive relief as well as compensatory and punitive damages.

Forbes alleged that he asked AETN to include him in the debate ⊥4 or give him additional time, and that his request was refused. He then telephoned the Federal Communications Commission and claimed that an FCC representative told him to "go through the motions" of a proper complaint, although it would be a waste of time. Believing that pursuit of his claim through the FCC would be pointless, Forbes wrote the FCC to request that his complaint be denied speedily so that he could seek an injunction in court. Instead, the FCC responded with a letter enclosing a statement of applicable law as well as instructions on how to file a complaint with the FCC. Forbes claims that he never received the enclosed materials, although he acknowledges receipt of the letter.

Forbes then sought injunctive relief in the District Court and moved for a preliminary injunction to mandate his inclusion in the debate. He alleged that AETN's reasons for excluding him from the debate were discriminatory and were specifically designed to keep the public from learning of Forbes's views on certain policy issues. In support of this position, Forbes claimed that an official of AETN stated that the network would run "St. Elsewhere" rather than a debate that included Forbes, and that another official of AETN stated that Forbes had not been included because he was not a "serious" candidate.

The District Court denied the request for injunctive relief on October 20, 1992. On October 21, 1992, sitting as a single circuit judge, the writer of this opinion denied Forbes's request for an injunction pending appeal. The next day, a panel of this Court declined to disturb that action. The basis for both rulings - that of the panel and that of the single judge - was that *DeYoung v. Patten, supra,* was controlling Circuit precedent and directly in point against Forbes.

On November 2, one day before the election, Forbes amended his complaint to include private television stations KHBS-TV and KHOG-TV, the American Broadcasting Company, and their agent, Darrel ⊥5 Cunningham (collectively "the private stations"), as defendants. In his amended complaint, Forbes alleged that the private stations had violated the provisions of the Communications Act by refusing to air one of his anti-abortion advertisements except during the "safe-harbor" hours of 11:00 p.m. to 6:00 a.m. without first making a determination that the ad was indecent. Forbes alleged a criminal conspiracy, "RICO treble damages," and violations of 42 U.S.C. § 1981 *et seq.*, and claimed the private stations' actions also were in violation of 47 U.S.C. § 315. He renewed his claims against the AETN defendants.

The AETN defendants filed a Rule 12(b)(6) motion, arguing that Forbes had no First or Fourteenth Amendment right to appear in a television debate, that he had no personal claim or cause of action under 47 U.S.C. § 315 to appear on television, that he failed to state a claim under 42 U.S.C. § 1981, and that he failed to state a cause of action against the AETN defendants. The private stations also moved for dismissal under Rule 12(b) (6), arguing that the District Court had no subject-matter jurisdiction under the Communications Act, and that Forbes had failed to exhaust his administrative remedies. The District court, after properly setting forth the standard for granting a Rule 12(b) (6) motion, concluded that the standard had been met by both sets of defendants. It concluded, following this Court's holding in *DeYoung v. Patten, supra,* that Forbes had no right of access to the public airways, that no implied right of action exists under the Communications Act; and that § 1983 cannot be used to enforce the rights granted by 47 U.S.C. § 315. Additionally, the Court concluded that the complaint contained only vague allegations of conspiracy that failed to state a claim under 42 U.S.C. § 1985. ⊥6

II.

In reviewing a dismissal for failure to state a claim, we take the allegations well pleaded in the complaint as true. Motions to dismiss should not be granted unless it is clear beyond

doubt that there is no set of facts the plaintiff could prove that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Forbes has raised three claims in his complaint. First, as against both the AETN defendants and the private stations, Forbes has claimed violations of 47 U.S.C. § 315 and a conspiracy under 42 U.S.C. § 1985. Second, Forbes has additionally claimed against AETN a § 1983 violation for failing to provide him with equal time as required by § 315. Finally, Forbes has alleged that AETN violated the First and Fourteenth Amendments by failing to include him in the debate.

A. Statutory Claims

First, with respect to Forbes's statutory claim, we agree with the District Court and the private stations that Forbes's complaint cannot stand. There is no private cause of action to enforce 47 U.S.C. § 315, and Forbes's proper course of action is to bring his claim before the Federal Communications Commission. Forbes failed to exhaust his administrative remedies; therefore, his claim that the private stations improperly refused to run his anti-abortion advertisement outside of safe-harbor hours was not properly before the District Court. Additionally, Forbes's claim that AETN improperly refused to grant him equal time, as required by § 315, likewise should have been brought before the FCC first and then appealed, if necessary, to a court of competent jurisdiction. See *DeYoung*, 898 F.2d at 633-35. (We adhere to this aspect of *DeYoung*.) Since Forbes has failed to exhaust his administrative remedies, the District Court was correct in declining to rule on his statutory claims. [7]

We further agree with the District Court that there is insufficient substance to Forbes's conspiracy claim to entitle him to relief under 42 U.S.C. § 1985. We also affirm the District Court's ruling that the failure to allege racial discrimination bars his claim under § 1981. Finally, we agree with the District Court that § 1983 is not available to enforce Forbes's claims under § 315 of the Communications Act, since that provision itself contains the remedy for its violation - a petition to the FCC. Nonetheless, we disagree with the District Court with regard to Forbes's constitutional claims, and now hold that

Forbes did allege a First Amendment violation well enough to survive a motion to dismiss. We now turn to this claim.

B. First Amendment Claim

The District court dismissed Forbes's First Amendment claim on the authority of this court's holding in *DeYoung*, 898 F.2d 632, that "(a) political candidate does not have a 'constitutional right of broadcast access to air his views.'" *Id.* at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980). The Court concluded that the only claim Forbes had to warrant his inclusion in the debate was under the equal-time provision of the Communications Act. Since there was no private right of action under the Communications Act, nor was § 1983 available to enforce its provisions, Forbes's only remedy was through the FCC. Letter from the District court to All Counsel of Record at 4, citing *DeYoung*, 898 F.2d at 634.

Generally speaking, it is true that a candidate does not have the right to demand air time. See *Kennedy for President Comm., supra.*[2] Under the circumstances of the present case, we hold that ⊥[8] Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough

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[2]In *Kennedy*, the FCC had denied a candidate's request for an opportunity to respond to the President's statements in a press conference. Since the press conference was a bona fide news event, and, therefore, the equal-time provision of the Communications Act was not triggered, the candidate argued that he had a First Amendment right to respond. The Court concluded that since there was no absolute right of access to the airwaves, the provisions of § 315 excluding bona fide news events from its requirements was not in violation of the First Amendment. *Kennedy*, 636 F.2d at 432. As a general rule, we agree with this principle - there is no First Amendment right to appear on television upon demand. However, the stations involved in *Kennedy* were private stations. See *Id.* at 419-20. In the present case, the fact that AETN is a public station and did, Forbes alleges, sponsor its own debate alters the analysis significantly.

to survive First Amendment scrutiny. In *DeYoung*, this Court concluded that a public television station, such as AETN, was a state actor. *DeYoung*, 898 F.2d at 631-32. We adhere to this conclusion. AETN is not a private entity; it is a state-owned television network; therefore, actions taken by the station, as well as actions taken by its employees and representatives, are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees.

As a state actor, AETN is faced with constraints not shared by other television stations. When it comes to the First Amendment claim, we conclude that *DeYoung* was wrongly decided. *DeYoung* holds that no First Amendment right to appear in a televised debate exists, at least beyond that given by § 315, *DeYoung*, 898 F.2d at 633-35, and that the only remedy available to a candidate in Mr. Forbes's position is to seek remedial action through the FCC. This holding would allow a state-owned station to exclude all Republicans, or all Methodists, or all candidates with a certain point of view, except to the extent, if any, [3] that the excluded ⊥9 candidates could obtain relief under the Communications Act. We believe the error of such a proposition is self-evident. The state may not, by statute or otherwise, take such a discriminatory action, absent a compelling state interest.

The AETN defendants suggest that the case should be governed by public-forum analysis. If it is, the same conclusion follows: a state agency does not have an absolute right to determine which of the legally qualified candidates for a public office it will put on the air. The reason for such an exclusion must be ascertained and measured against First Amendment standards.

---

[3] Regardless of the sponsor, the FCC has allowed non-inclusive debates to be broadcast over public stations. See *In re Sagan*, 1 FCC Rcd 10 (1986). The deference we give administrative agencies on questions of statutory interpretation does not extend to constitutional issues. See *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, 492 n.4 (Clark, J., dissenting), *cert. denied*, 112 S.Ct. 71 (1991).

In its discussions of public versus nonpublic fora, the Supreme Court has divided government property into roughly three categories. The first is the traditional public forum, such as the town square, "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Public television stations do not fit into this category - there is no unlimited right of access to the airwaves. The second category is the limited public forum, a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), a limited topic, or a limited class of speakers. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the factfinder would have to make after carefully looking at the nature of the debate ⊥10 forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*, 460 U.S. at 45.

The third category of governmental property is the nonpublic forum, which consists of property not usually compatible with expressive activity. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Even in the context of the nonpublic forum certain minimum First Amendment requirements apply:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he

> is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

*Id.* at 806 (citations omitted). Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights. [4] See ⊥11 *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (while there is no First Amendment right to receipt of public school funds, a state school is not permitted to refuse funding because it disagrees

---

[4] AETN and the Public Broadcasting System amici cite other circuits which they say have concluded otherwise. Most significantly, they cite *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987); *Chandler v. Georgia Public Telecommunications Comm'n.*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S.Ct. 71 (1991); and *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). These cases do not precisely address the case before us. *Chandler* involved a factual situation similar to that in the case at bar; however, the Georgia Public Telecommunications Commission had offered the candidates there thirty minutes of air time to respond to the debate from which they were excluded, something AETN allegedly refused to do for Forbes. Additionally, we respectfully disagree with the Eleventh circuit's conclusion that the First Amendment was not implicated by the Georgia public television station's actions. See *Chandler*, 917 F.2d at 490-94 (Clark, J., dissenting). *Muir* did not involve a debate at all, but rather an attempt by Alabama and Texas public television viewers to force their public television stations to air a particular show. *Muir* correctly assesses the right of the public to have access to air time, but does not address the situation facing us here. *Johnson* involved a broadcast debate sponsored by a third party, not by a public television station.

with an organization's message). It should be noted that the Public Television station amici acknowledge that AETN does not have the right to exclude Forbes simply because they disagree with his point of view. Certainly, were the answer otherwise, there would be nothing to prevent the party in power from excluding all opposing parties, or particular religions, or minorities from public-television-sponsored debates.

III.

AETN has not filed an answer to Forbes's complaint; therefore, it has not yet articulated any principled reason for excluding Forbes. See *Cornelius*, 473 U.S. at 811 ("existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination"). AETN must provide a rational and viewpoint- neutral justification for its determination. On this record, AETN has not yet done so; therefore, Forbes has stated a claim upon which relief can be granted, especially if we credit Forbes's allegation, as we must in reviewing a Rule 12(b) (6) dismissal, that ⊥12 AETN planned to air "St. Elsewhere" rather than allow Forbes to debate.

So much of the judgment as dismissed Forbes's statutory claims is affirmed. So much of the judgment as dismissed his claim under the First and Fourteenth Amendment for failure to state a claim is reversed, and the cause is remanded for further proceedings consistent with this opinion. That portion of *DeYoung v. Patten* which holds that the First Amendment places no restraint, beyond that imposed by the Communications Act, on the right of state agencies to sponsor candidate debates and pick and choose which candidates may take part, is overruled. [5]

It is so ordered.

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[5] Our holding applies only to debates that are sponsored by state instrumentalities. It does not apply to private-television-sponsored debates, nor to debates sponsored by third parties that are reported in good faith by public television stations.

McMILLIAN, Circuit Judge, joined by JOHN R. GIBSON, Senior Circuit Judge, FAGG, MAGILL, and HANSEN, circuit Judges, concurring in part and dissenting in part.

Although I agree with most of the majority opinion, for the reasons discussed below, I would affirm the order of the district court dismissing Forbes's complaint. Accordingly, I concur in part and dissent in part.

It has been an instructive experience to reconsider these issues. As a preliminary matter, however, I would hold that the FCC has exclusive, jurisdiction of this litigation, including both the statutory and the constitutional claims, with judicial review in the court of appeals and then the Supreme Court. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see also Columbia Broadcasting System. inc. v.* ⊥13 *Democratic National Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Forbes should have taken his complaints to the FCC in the first instance. Litigation in the district court is inconsistent with and necessarily undermines the exclusive jurisdiction of the FCC.

> Balancing the various First Amendment interests involved in the broadcast media and determiningwhat best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved [since 1927]. . . .
>
> . . . The judgment of the Legislative Branch cannot be ignored or undervalued simply because [Forbes has cast his] claims under the umbrella of the First Amendment. That is not to say that we "defer" to the judgment of the Congress and the [Federal Communications] Commission on a constitutional question, or that we would hesitate to invoke the constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.

*Columbia Broadcasting System. Inc. v. Democratic National*

*Comm.*, 412 U.S. at 102-03.

It may be true that the FCC is not as vigilant or as sensitive to first amendment interests as it should be. *See Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1056-57 (5th Cir. 1982) (banc) (Frank M. Johnson, Jr., J., dissenting), *cert. denied*, 460 U.S. 1023 (1983). It may also be true that technological changes since the Supreme Court decided *Red Lion Broadcasting Co. v. FCC* in 1969 have largely undermined the basis for the existing pervasive federal regulation of the broadcasting industry as a whole and, as a result, "raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today." See *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (banc) (Richard S. Arnold, C.J., concurring in the judgment). However, absent such developments, I would require Forbes to raise ⊥14 both his statutory and constitutional claims in proceedings before the FCC and not as an original matter in the district court.

Assuming the district court did have jurisdiction, I agree the district court correctly dismissed Forbes's 42 U.S.C. § 1985 civil conspiracy claim because his allegations were too vague and his 42 U.S.C. § 1981 claim because he failed to allege discrimination on the basis of race. Slip op. at 7. I also agree the district court correctly dismissed Forbes's Federal Communications Act claims against the AETN defendants for excluding him from the debate and for refusing him air time and against the private stations for refusing to broadcast his political advertisements except during the safe-harbor hours. *Id.* at 6. The district court lacked subject matter jurisdiction over these claims. Forbes should have taken these complaints to the FCC first. Forbes did not do so. The FCC has considered complaints involving candidate debates as well as complaints involving anti-abortion advertisements. Then, had the FCC ruled against him, Forbes could have sought judicial review in the court of appeals, not the district court. *DeYoung v. Patten*, 898 F.2d 628, 633-34 (8th cir. 1990) (no implied private right of action). I also agree that Forbes cannot use 42 U.S.C. § 1983 to enforce these statutory claims. Slip op. at 7. *DeYoung v. Patten*, 898 F.2d at 634-35 (§ 1983 remedy

foreclosed by comprehensive enforcement mechanism).

With respect to Forbes's first amendment claim, I also agree that there is state action for purposes of § 1983 because AETN is an instrumentality of the state. It is a state-owned, noncommercial, public television station; its employees are state employees who are represented in this appeal by the state attorney general. Slip op. at 8; *DeYoungv. Patten*, 898 F.2d at 631-32. I do not agree, however, that Forbes, even though he was a legally qualified candidate, had a first amendment right to be included in the candidate debate or that the candidate debate was a public forum for first amendment purposes. In my view, the candidate ⊥15 debate was a nonpublic forum. Like private commercial television, public television is not a traditional public forum; it does not extend a general invitation to the public to appear on or participate in its programs. Nor do I think the candidate debate was a limited or quasi-public forum; the format of this candidate debate Was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates. For this reason, I would hold that the candidate debate was a nonpublic forum.

"Control over access to a nonpublic forum can be based on . . . speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985) (citations omitted). Presumably, AETN decided to limit the number of candidates in order to maintain a traditional debate format, rather than to expand the format to a panel discussion. Because AETN has yet to file an answer, AETN's reasons for designing the format of the candidate debate as it did are not known. However, it would not have been unreasonable or viewpoint-specific for AETN to have limited the candidate debate to only the two major party candidates, thus excluding minor party candidates and independent candidates, or, for that matter, to the two candidates who had the most support or who appeared to have the most likely chance of winning, for example, on the basis of poll results. It may not have been good programming, or even good politics, given voters' inter-

est in and the occasional historical success of minor party and independent (and even fringe) candidates, to limit the candidate debate to the two major party candidates. Nonetheless, I would hold that AETN had the editorial and programming discretion to structure the candidate debate along those lines and that excluding Forbes from the candidate debate for those reasons would be viewpoint neutral. ⊥ 16

A true copy.
Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WAFS

| | | |
|---|---|---|
| Ralph P. Forbes, and | * | |
| The People, | * | |
| Appellant, | * | Appeal from the |
| | * | United States |
| vs. | * | District Court |
| | * | for the Western |
| Arkansas Educational | * | District of |
| Television Commission | * | Arkansas |
| Network Foundation, | * | |
| etc., et al., | * | |
| Appellees. | | |

The petition for rehearing by the appellant is denied.

June 21, 1994

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WAFS

| | | |
|---|---|---|
| Ralph P. Forbes, etc., Appellant, | * | |
| | * | Appeal from the United States District Court for the Western District of Arkansas |
| vs. | * | |
| Arkansas Educational Television Commission Network Foundation, et al., Appellees. | * | |

Appellant's motion to recall the mandate has been considered by the Court and is denied.

July 19, 1994

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX D

**United States Court of Appeals**
**For The Eighth Circuit**

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NO. 92-3374WA

---

| | | |
|---|---|---|
| Ralph P. Forbes, and the People, *Appellant,* v. Arkansas Educational Television Communications Network Foundation, and its Board of Directors in their official capacities; Arkansas Education Telecommunications, and its members and officers; Susan J. Howarth, in her official capacity as Executive Director; Victor Fleming, in his official capacity as Chairman; G.E. Campbell, in his official capacity as Vice-Chairman; Dr. Caroline Whitson, in her official capacity as Secretary; Diane Blair, in her official capacity as Commissioner; S. McAdams, in his official capacity as Commissioner; James Ross, in his official capacity as Commissioner; Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager; | * * *

Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does;
*Appellees.*

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Filed: December 22, 1992

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Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R. GIBSON, circuit Judges.

PER CURIAM.

This case is before us on petition for rehearing. This appeal, which involves only the question of preliminary injunctive relief, has become moot. The debate in question has been held, and it is no longer possible for the grant or denial of preliminary injunctive relief with respect to it to have any meaning.

Accordingly, the appeal is dismissed as moot. This cause is remanded to the District Court with instructions to vacate its order, denying preliminary injunctive relief on the merits, and to enter a new order, denying the motion for preliminary injunction as moot.

The underlying case is not moot. The complaint contains a prayer for money damages. The District Court should proceed to determine the case and enter final judgment, following which any party aggrieved is at liberty to file a new notice of appeal. See *McFarlin v. Newport Special School District*, No. 92-1570 (8th Cir. December 3, 1992). The petition for rehearing is denied as moot. A separate order will be entered on the suggestion for rehearing en banc.

It is so ordered.
A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH P. FORBES AND THE PEOPLE PLAINTIFFS

v. Civil No. 92-2190

The ARROGANT ORWELLIAN BUREAUCRATS of the ARKANSAS EDUCATIONAL TELEVISION COMMISSION, and its BOARD of DIRECTORS in their official capacities; KHBS TV CHANNEL 40; KHOG TV CHANNEL 29 and DARRELL CUNNINGHAM, in his individual capacity; et al. DEFENDANTS

*ORDER*

On this 16th day of December, 1992, upon consideration of defendants' motions to dismiss, the court finds for the reasons set forth in a letter of even date that said motions should be and hereby are granted and this case is dismissed with prejudice.

IT IS SO ORDERED.

s/ H. Franklin Waters
United States District Judge

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF ARKANSAS**
**POST OFFICE BOX 1908**
**FAYETTEVILLE, ARKANSAS 72702-1908**

**H. FRANKLIN WATERS,**
**CHIEF JUDGE**

December 16, 1992

Ralph P. Forbes
Box 88
London, Arkansas 72847

Thomas S. Gay
Senior Assistant
Attorney General
323 Center Street, Suite 200
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Mr. Robert L. Jones, III
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401 North 7th Street
P.O. Box 2023
Fort Smith, Arkansas 72902-2023

RE: *Ralph P. Forbes and the People v. The Arrogant Orwellian Bureaucrats, et al.*
Civil No. 92-2190

Gentlemen:

Currently before the court is a motion to dismiss filed by separate defendants Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver and William Clinton, sued in their official capacities as members and officers of the Arkansas Educational Telecommunications Network by plaintiff Ralph Forbes. Also before the court for consideration is a motion to dismiss filed by

separate defendants KHBS TV Channel 40, KHOG TV Channel 29, and Darrell Cunningham, sued in his individual capacity by Forbes. The court has considered these motions and the response thereto filed by Mr. Forbes and is now ready to rule. For the reasons set forth below, the defendants' motions to dismiss should be and are hereby granted.

Ralph P. Forbes was an independent candidate for the office of United States Representative for the 3rd congressional District of Arkansas. Forbes initiated this action on October 19, 1992, just

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weeks before the November 3, 1992 presidential and congressional election, alleging that the AETN separate defendants planned to unlawfully and unconstitutionally exclude him from a congressional debate to be sponsored and broadcast by AETN on Thursday, October 22, 1992. On behalf of himself and his constituents, Forbes alleged that the AETN defendants unlawfully closed down polling places in counties he carried in the 1990 election, tampered with the voting process in an attempt to defeat him, and denied his access to public facilities for expression of his political beliefs. Forbes alleged that his exclusion from the debate, coupled with actions taken by the defendants, deprived Forbes and his constituents their rights to vote under 42 U.S.C. § 1981. Forbes sought declaratory and injunctive relief plus compensatory and punitive damages.

Forbes then requested an "emergency temporary restraining order with demand for accelerated consideration and expedited injunctive relief" to enjoin defendants from barring his participation in the October 22nd debate. By order on October 20, 1992, this court denied Forbes' request for injunctive relief. Forbes appealed the decision to the Court of Appeals for the Eighth Circuit, and on October 21, 1992, Judge Richard S. Arnold made the provisional ruling that the district court, pursuant to *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), correctly had denied injunctive relief. On October 22, 1992, Judges Arnold, McMillian and Gibson

reviewed the order entered by Judge Arnold on the previous day. The panel found that *DeYoung* was binding precedent and dispositive of the matter, and affirmed the decisions of the district court and Judge Arnold.

On November 2, 1992, Forbes amended his complaint to include commercial television broadcasting stations KHBS TV Channel 40, its affiliate KHOG TV Channel 29, the American Broadcasting Company (ABC), and their agent Darrell Cunningham, in his individual capacity. Forbes additionally alleged that these defendants refused to air his political Pro-Life advertisements at any time other than the "safe harbor" hours between 11:00 p.m. and 6:00 a.m. In violation of 42 U.S.C. § 1981 and the First and Fourteenth Amendments to the United States Constitution.

The separate defendants have filed a Rule 12(b) (1), (2) and (6) motion to dismiss this action, asserting that the court lacks subject matter and personal jurisdiction under the Eleventh Amendment. Defendants also assert that plaintiff (1) has no First or Fourteenth Amendment right to appear on a public television debate; (2) has no personal claim or cause of action under the Federal communications Act to appear on a public television political debate; and (3) has failed to state a claim under 42



U.S.C. § 1981. Defendants additionally assert that Forbes does not share an injury with the members of the purported class pursuant to Rule 22 of the Federal Rules of Civil Procedure, that Forbes has failed to state a cause of action against separate defendants Oliver and Clinton, and that the issues raised by Forbes have become moot by the passage of the election.

Defendants KHBS, KHOG and Darrell Cunningham have also filed a Rule 12(b)(1) and (6) motion to dismiss, asserting that the court has no subject matter jurisdiction for a violation of the Federal Communications Act. Defendants also assert that Forbes has failed to exhaust his administrative remedies and failed to state a cause of action under 42 U.S.C. § 1981.

A Rule 12(b) motion is to be read as a whole, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), and it is to be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983). In addition, complaints are to be "liberally construed in favor of the plaintiff," *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and *United States v. Advance Machine Corp.*, 547 F.Supp. 1085, 1088 (D. Minn. 1982). It has also been said that all facts pleaded in the complaint are taken to be true for 12(b)(6) purposes, *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976), and all reasonable inferences from facts pleaded in the complaint are to be drawn and deemed to be true. *See* Wright & Miller, *Federal Practice and Procedure* § 1363 (1969).

After an examination of Forbes' complaint and amended complaint, it is apparent that Forbes can "prove no set of facts in support of his claim which would entitle him to relief." In light of *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), Forbes has no cause of action under either the Federal communications Act or 42 U.S.C. § 1983 for denial of participation in the congressional debate or for denial of requested air time for political advertisements. Furthermore, Forbes had failed to state a claim under 42 U.S.C. § 1981.

In his pleadings, Forbes leans heavily upon the constitution and its framers, asserting that he and his constituents have been denied their inalienable rights as American citizens to participate in election debates and television campaigning. Forbes, however, is erroneous in his reliance upon the constitutional provisions as providing a remedy in this instance. The Court of Appeals for the Eighth circuit recently held that a political candidate has no First Amendment right to appear on televised debates "to any extent



greater than the limited right of access granted by the equal time provision of the Federal Communications Act." *De-*

*Young*, 898 F.2d 632. Finding access to broadcasting to be a creature of federal statute, the court stated that

> [a] political candidate does not have a "constitutional right of broadcast access to air his [or her] views."

*Id.* at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. 1980).

Thus, Forbes (sic) right to participate in televised debates and air political advertisements stems entirely from the equal time provision of the Federal communications Act. See 47 U.S.C. § 315(a). The Act, however, does not provide expressly for a private cause of action for violation of its provisions. While the DeYoung court found no legislative history on point, the court found the legislative structure of the Act and the FCC24 to be helpful. The court noted that the Act establishes "a unified and comprehensive regulatory system for the [telecommunications] industry." Id. at 633, quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940). Recognizing that Congress had created the FCC and granted it broad regulatory authority and remedial power, the court found that

> the administrative enforcement mechanism established by the Act and the broad authority vested in the FCC to regulate broadcasters in general and to enforce the equal time provisions in particular indicate that Congress did not intend to create a private cause of action to enforce the equal time provision.

*DeYoung*, 898 F.2d at 634. Thus, consistent with *DeYoung*, this court finds that Forbes has no federal cause of action pursuant to the Constitution or the Federal Communications Act for denial of participation in a congressional candidates' debate or for denial of Pro-Life advertisements at times other than "safe harbor" hours. Forbes must seek remedy for his alleged violations with the FCC. Likewise, Forbes has no cause of action for enforcement of the Federal Communications Act under 42 U.S.C. § 1983. The Eighth Circuit similarly held in

*DeYoung* that "a § 1983 remedy for violation of the equal time provision would be inconsistent with the overall legislative scheme." *DeYoung*, 898 F.2d at 635." Forbes' sole remedy for any alleged violation of the provision of this Act, therefore, lies solely within the administrative powers of the FCC.

All Counsel of Record December 16, 1992 Page 5

Forbes has also alleged that conduct on behalf of the defendants, in their official capacity, violated 42 U.S.C. § 1981. The complaint, however, is void of any alleged racial discrimination, fatal to a § 1981 claim. *Fantroy v. Greater St. Louis Labor Council*, 478 F.Supp. 355 (E.D. Mo. 1979). Forbes and his constituents have alleged discrimination by the defendants on behalf of Forbes' political beliefs rather than racially motivated discrimination. Thus, Forbes' § 1981 claim against the defendants must also fail as a matter of law. Likewise, Forbes conspiracy allegations must fail. It is well settled that unsupported, conclusory allegations of a conspiracy, such as those pled by Forbes, are insufficient to state a claim under the civil Rights Acts. *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980). The court finds, therefore, that the plaintiffs' constitutional and statutory claims must fail as a matter of law. The defendants' motions to dismiss are granted and this action is dismissed.

A separate order in accordance herewith will be entered concurrently.

Yours very truly,

s/ H. Franklin Waters

cc: U.S. Clerk

## APPENDIX G

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

No. 92-3374WA

---

Ralph P. Forbes,
Appellant,

v.

Arkansas Educational Television Communication Network Foundation, et al.,
Appellees.

*
* On Motion for Injunction
* Pending Appeal from the
* United States District
* Court for the Western
* District of Arkansas.

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Filed: October 21, 1992

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Before RICHARD S. ARNOLD, Chief Judge.

---

*ORDER*

This matter was heard in chambers by me as a single circuit judge, upon the application of the appellant for injunctive relief pending appeal. After a full argument and discussion of all of the issues, I denied the motion. The reasons are fully stated on the record, and a transcript of the proceedings, including the reasons for the decision, is available to either side by arrangement with the Court Reporter.

The most important point, in my view, is that the plaintiff-appellant has only a small chance of prevailing on the appeal, under the controlling precedents of this Court, especially *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). This case appears to be a conclusive precedent against most

of the appellant's theories, and it of course binds me, as it bound the District Court.

I have instructed the Clerk to submit the matter of injunctive relief pending appeal to a panel of three judges, including me. The panel will endeavor to rule on the question before the television debate in question, which is scheduled for 7:00 p.m. on the evening of Thursday, October 22, 1992. I have explained to both sides that my ruling is provisional only, and that the panel can overturn it.

Motion denied.

/s/ Richard S. Arnold
Richard S. Arnold, Chief Judge
United States Court of Appeals
for the Eighth Circuit

Order entered at direction of Court:
s/ Michael E. Gans (?)
Clerk, U.S. Court of Appeals, 8th Circuit

## DECLARATION OF RIGHTS

Petitioner Forbes has not had the funds to pay for transcripts of these October 21, 1992, proceedings at the conclusion of which Gene Goss vowed to telecast *St. Elsewhere* re-runs rather than allow the people to hear Forbes . However, petitioner believes the following controlling questions of law and fact in answer to Petitioner's **DEMAND FOR DECLARATORY JUDGMENT**, pursuant to 28 USC §§ 2201 and 2202, were conceded in oral argument by the state defendants and verbally affirmed by the Court:

**Therefore,** the People are sovereign over AETN *or any other bureaucracy,* and the people have a *vital right* to know, and be informed, especially in matters relating to elections.

The Voters of Arkansas have the right to see and hear *all* Candidates and all views, ideas and opinions, so they can cast

an informed ballot on November 3rd, 1992.

And, Ralph P. Forbes, is an American Citizen whose rights must be protected.

Plaintiff Forbes is the legally qualified, certified Independent Candidate for the office of Representative from the third congressional district of the State of Arkansas who has the right to be afforded equal broadcasting opportunities with all other candidates.

And that Forbes' status as a candidate carries with it an inherent, inseparable, indivisible right for the people to hear his uncensored views protected by the equal broadcasting opportunities established by law to protect not the rights of the candidate, but also the paramount rights of the people.

Plaintiff Forbes is entitled to Equal Opportunities and Protections by the First, Fifth and Fourteenth Amendments to the United States Constitution, and numerous laws, statutes, etc., made in pursuance thereof, including but not limited to *47 USC 315, 396*, and *OMB Circular 128*, et seq.;

The Constitution of the State of Arkansas, and numerous laws, statutes, etc., made in pursuance thereof, including but not limited to *ACA 6-3-101*, et seq. . . .;

. . .

**Wherefore,** the People of Arkansas, and Independent Candidate Ralph Forbes, have enforceable rights . . .

* * *

The foregoing **Declaration of Rights**, *status, and controlling questions of law and fact* were conceded by the state defendants and verbally confirmed by the Court at the Hearing on October 21, 1992.

## APPENDIX H

### Pertinent Parts Of THE CONSTITUTION OF THE UNITED STATES

**The Constitution, the Supreme Law, the Paramount Contract, *Controlling* Compact,** and The Overruling Law of The Land, states in pertinent parts:

*Preamble*

We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish the Constitution of the United States of America.

**Article I.**

Sect. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

Sect. 2. The House of Representatives shall be composed of members chosen every second year *by the people* of the several states ... {Italics supplied by Petitioner.}

**Article III.**

Sect. 2: 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States ...

**Article IV.**

Sect. 2: 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Sect. 4. The United States shall guarantee to every State in this Union a republican form of government ...

**Article VI.**

Sect. 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every State

shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Sect. 3. ... and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

### *PREAMBLE TO THE BILL OF RIGHTS*

The conventions of a number of the States having at the time of their adopting the Constitution of the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.

### 1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### 5th Amendment

No person shall be ... deprived of life, liberty, or property, without due process of law ...

### 7th Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

### 9th Amendment

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## 14th Amendment

Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Sect. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. .. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. . . .

Sect. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## APPENDIX I
## Pertinent Parts Of
## THE UNITED STATES CODE

### JURISDICTION

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. *28 USC § 1331*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interests and costs, and is between --

(1) citizens of different States; . . .

(c) For purposes of this section ...

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principle place of business ... *28 USC § 1332*

**Civil rights and elective franchise**

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights, including the right to vote. *28 USC § 1343*

The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right to vote of citizens of the United States to vote in any State.

*28 USC § 1357*

The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of subchapter 1-A to 1-C of this chapter shall have exhausted any administrative of other remedies that may be provided by law. *42 USC 1973j(f)*

**28 USC § 2201. Creation of remedy**

(a) In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

**28 USC § 2202. Further relief**

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

**TITLE 5 UNITED STATES CODE § 706**
***Administrative Procedure Act***

To the extent necessary to decision and when presented, *the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.* The reviewing court shall - - -

(1) compel agency action *unlawfully withheld or unreasonably delayed;* and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be - - -

(A) *arbitrary , capricious, an abuse of discretion, or otherwise not in accordance with law;*

(B) *contrary to constitutional right, power, privilege, or immunity;*

(C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;*

(D) *without observance of procedure required by law;*

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) *unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.*

In making the foregoing determinations, *the court shall review the whole record or those parts of it cited by a party,* and due account shall be taken of the rule of prejudicial error.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.) Italics supplied

## CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in at action at law, suit in equity, or other proper proceeding for redress ...

*Title 42 USC, Section 1983*

**Application of 1979 amendments.** Act Dec. 29, 1979, P.L. 96-170, §3, 93 Stat. 1284, which appears as 28 USCS § 1343 note, provided that the amendments made to this section by such Act are applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after enactment on Dec. 29, 1979.

---

**CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS**

**(3) Depriving persons of rights or privileges.** If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, *the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.*

*Title 42 USC, Section 1985 (3)* Italics supplied

*42 USC 1986* provides: Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section (1985 of Title 42) are about to be committed, and having power to prevent or aid in preventing the commission of same, neglects or refuses to so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act which such person by reasonable diligence could have prevented; and such *damages may be recovered in an action on the case;* and any number of persons guilty of such wrongful act, neglect, or refusal, may be joined as defendants in the action.

[Italics supplied.]

**47 USC § 312** provides:

Administrative Sanctions (a) The Commission may revoke any station license or construction permit --

... (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy. *cf.*, 47 CFR 73.1944 @44a

**47 USC § 315 says in pertinent part:**

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this section upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

(1) *bona fide* newscast,

(2) *bona fide* news interview,

(3) *bona fide* news documentary (if the appearance of the candidate is incidental to the presentation of the subjects covered by the news documentary), or

(4) on the spot coverage of *bona fide** news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. *Nothing in the foregoing sentence shall be construed as relieving broadcasters,* in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, *from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.* [Italics supplied.] *cf.*, 47 CFR 73.1941

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**bona fide:* in good faith, without fraud; authentic, genuine, legitimate

**TITLE 5 U.S.C. § 555. Ancillary matters**

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter [5 USCS §§ 551 et seq.].

(b) A person *compelled* to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. *With due regard for the* convenience and *necessity of the parties* or their representatives *and within a reasonable time*, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or

data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) *Prompt notice shall be given of the denial in whole or in part* of a written application, petition, *or other request* of an interested person made in connection with *any* agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

{Italics supplied.}

**Title 47 U.S.C. §402. Judicial review of Commission's orders and decisions**

**(a) Procedure**

Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

**(b) Right to appeal**

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any *applicant for a construction permit or station license,* whose application is denied by the Commission.

(2) By any *applicant for the renewal or modification of any such instrument* of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any *such instrument* of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any *applicant for the permit* required by section 325

of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the *holder of any construction permit or station license* which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by order of the Commission granting or denying any application *described in paragraphs (1) to (4) of this subsection.*

(7) By any person *upon whom an order to cease and desist has been served* under section 312 of this title.

(8) By any *radio operator* whose license has been suspended by the Commission.

**(c) Filing notice of appeal; contents; jurisdiction; temporary orders**

Such appeal shall be taken by filing a notice appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary of relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

**(d) Notice to interested parties; filing of record**

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

**(e) Intervention**

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

**(f) Records and briefs**

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

**(g) Time of hearing; procedure**

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5, United States Code [5 USCS § 706].

**(h) Remand**

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the

court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

**(i) Judgment for Costs**

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

**(j) Finality of decision; review by Supreme Court**

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

(As amended Sept. 13, 1982, P.L. 97-259, Title I, §§ 121, 127(b), 96 Stat. 1097, 1099; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(50, 98 Stat. 3361.)

{Italics supplied.}

**Title 28 § 2342. Jurisdiction of court of appeals**

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

* * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title {which *requires* the agency to *"promptly* give notice thereof ..."}.

## Title 28 U.S.C. § 158. Appeals

*(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees,* of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

*(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a)* and (b) *of this section.*

{Italics supplied.}

**Title 28 U.S.C. § 1651. Writs**

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, c. 646, § 1, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.)

## APPENDIX J: Pertinent Parts Of FCC Rules & Regulations

47 C.F.R. § 73.1941 provides:

(a) *General requirements.* Except as otherwise indicated in § 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other such candidates for that office to use such facilities. *Such licensee shall have no power of censorship over the material broadcast by any such candidate* ... {Italics supplied.}

47 C.F.R. § 73.1944 provides:

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for *willful* or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) *Weekend Access.* For purposes of providing reasonable access, *a licensee shall make its facilities available for use by federal candidates on the weekend before the election* if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. *Licensees shall not discriminate between candidates with regard to weekend access.* {Italics supplied.}

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
21 AUG 1992

IN REPLY REFER TO:
8210-AJZ/MJM

Vincent A. Pepper, Esquire
Counsel, Gillett Communications of Atlanta, Inc.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Irving Gastfreund, Esquire
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005

Dear Messrs. Pepper & Gastfreund:

This is in reference to the 'Petition for Declaratory Ruling' filed on behalf of Gillett Communications of Atlanta, Inc. ('Gillett'), licensee of television station WAGA-TV, Atlanta, Georgia, as well as the 'Petition for Declaratory Ruling' filed by Kaye, Scholer, Fierman, Hays & Handler ('Kaye Scholer'), a law firm representing 'numerous' unnamed television and radio stations. These petitions both claim that federal candidate anti-abortion political advertisements featuring dead fetuses and fetal tissue depict excretory activity and are therefore indecent. Consequently, they seek our concurrence that channelling the advertisements to hours when children are unlikely to be in the audience would be consistent with the 'reasonable access' and 'no-censorship' provisions of the Communications Act of 1934, as amended (Sections 312(a)(7) and 315, respectively).

*Factual Background*

Gillett poses the following question:

> Whether a licensee may channel a use by a legally-qualified federal candidate to a safe harbor when chil-

dren are not generally present in the audience if the licensee determines in good faith that the proposed use is indecent or otherwise unsuitable for children.

Gillett states that certain political advertisements feature graphic depictions of dead fetuses and that the candidate sponsors of these advertisements have sought and obtained broadcast time on WAGA-TV pursuant to the reasonable access provisions of Section 312(a)(7). . . .

* * *

*Discussion*

To the extent these petitions seek a general ruling by the Commission that a class of program material -- that is, any depiction of dead fetuses or fetal tissue is -- indecent, we decline to so rule. [WAGA-TV]s request are also at odds with Commission decisions that have declined to render indecency rulings in advance of broadcasts to avoid imposing prior restraints on protected speech. *See Letter to William J. Byrnes, Esquire (WBAI(FM))*, 63 RR 2d 216 (MMB 1987), *review denied sub nom. Pacifica Foundation, Inc.*, FCC 87-215, released June 16, 1987; *Letter to Christian Action Network*, (MMB) released June 12, 1992.

**Similarly, *we cannot accept petitioners' suggestion that broadcasters be permitted to classify political use material as indecent so that they may restrict the time at which it airs* even where it does not meets the Commission's indecency definition. Nor can we permit a broadcaster to alter the scheduling of such material because the broadcaster finds it otherwise "unsuitable" for children. Such channeling would violate a federal candidate's reasonable access rights under Section 312 (a) (7) of the Act, which requires broadcasters to permit legally qualified candidates "reasonable access" to their facilities. As a general matter, broadcasters may not direct candidates to unwanted times of the day or evening. We have also ruled that candidates are entitled to access to "prime time."** *Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079, (1978)... [F]ederal

candidates ... cannot be banned from entire dayparts. 68 FCC 2d at 1091. Therefore, the practice of channelling material that is not indecent, even if content-neutral (*i.e.*, channelling all federal candidates to specific times of the day or evening when there may be no reasonable risk of children in the audience) would deprive federal candidates of their rights to determine how best to conduct their campaigns. See *CBS, Inc.*, 453 U.S. 367 (1981).[1] .. {at 2 and 3, bold emphasis supplied.}

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[1] ... [I]ndecency enforcement is currently restricted to material aired between 6:00 a.m. and 8:00 p.m. *See Kansas City Television Ltd.*, 4 FCC Rcd 6706 (1989) {f.n. 1 at 3}

* * *

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987)

Upon review of the tape submitted by Gillette [WAGA-TV], *we conclude that the advertisement is not indecent* ... Neither the expulsion of fetal tissue nor fetuses themselves constitutes "excrement."[2] ... {at 4}

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[2] Webster's Dictionary defines "excrement" as "waste material, especially fecal matter, expelled from the body after digestion." Webster's II New Riverside University Dictionary, p. 451 (1984). Federal case law has been similarly restricted in scope. *See, e.g., L.M. Communications*, 7 FCC Rcd 1595 (MMB 1992); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). at 4

* * *

In view of the foregoing, the requests for declaratory ruling by Gillett Communications of Atlanta, Inc., and Kaye, Scholer, Fierman, Hays & Handler ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

s/ Roy J. Stewart
Roy J. Stewart, Chief
Mass media Bureau

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

October 30, 1992

IN REPLY REFER TO:
DA 92-1503

Mr. Daniel Becker
Becker for Congress
P.O. Box 845
Canton, Georgia 30114

Dear Mr. Becker,

This responds to your complaint, filed October 28, 1992, concerning the refusal of WAGA-TV, Atlanta, Georgia, to air your 30 minute political program "Abortion in America: the Real Story." WAGA-TV apparently recognizes your right as a federal candidate to seek "reasonable access" to its broadcast facilities under Section 312(a)(7) of the Communications Act and its obligation under Section 315(a) of the Act not to censor programming aired on behalf of political candidates. It appears however, that WAGA-TV believes that your program includes indecent material and that if it were to broadcast this material outside the indecency "safe harbor," it would violate the indecency prohibition contained in 18 U.S.C. Section 1464. Accordingly, WAGA-TV has offered to provide you with price and availability information for airing your ad in the "safe harbor" period, but has otherwise declined to accept the advertisement. You have asked the Commission to intervene to ensure that you are granted access to air the subject program.

The Commission and Bureau have declined to render indecency rulings in advance of broadcasts.[1] *See Letter to Christian Action Network* (MMB), released June 12, 1992 (Bureau declined to render indecency ruling in advance of broadcasts to avoid imposing prior restraints on protected speech. . .

* * *

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[1] By contrast, the Bureau did make an indecency ruling on a ***different*** anti-abortion advertisement *after* the ad had

actually aired on a television station. *See Gillette Communications of Atlanta, Inc. and Kaye, Scholer, Fierman, Hays and Handler*, DA 92-1160 (MMB), released August 21, 1992. **The Bureau concluded that the advertisement was not indecent *and that licensees therefore could not "channel" the ad to the indecency safe harbor without running afoul of Sections 312(a) (7) and 315 of the Communications Act.*** The instant case presents the separate question of whether a licensee, in the absence of a Commission ruling as to whether a given political commercial is or is not indecent, may nonetheless channel the advertisement to the indecency safe harbor where it reasonably and in good faith determines that the ad is indecent.

{Bold emphasis supplied by petitioner.}

* * *

Sincerely,

s/ William H. Johnson(?)
for Roy J. Stewart
Chief, Mass Media Bureau

## *REQUEST FOR DECLARATORY RULING CONCERNING ACCESS TO TIME ON BROADCAST STATIONS, 25 F.C.C.2d 216 (1970)*

"Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the *procedural rules* that control the public forums for discussion. If someone - a moderator, or radio-television licensee - applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, *then a censorship exists as invidious as outright thought control.* There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. *And if this Commission does not enact them, then the courts must require them.*"

FCC Commissioner Johnson, *25 F.C.C.2d 216, 232.*
Quoted in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 93 S.Ct. at 2115-2116; 412 U.S. at 161

* * *

**"The issue before us ought to be stated starkly. It is, quite simply, *who is to retain the potential to rule America?*** We know, if we are to be honest with ourselves, which segments of the economic and social structure have the loudest voices in the decision-making process in Washington. But the potential for popular check remains. *It remains, however, only so long as the people can obtain education and information,* only so long as they can communicate with each other, only so long as they can retain potential control over the mass media of the country. So long as we preserve the people's potential to rule - their potential opportunity to participate in the operation of their mass media - there is some hope, however small, that some future generation - perhaps the next - will use this potential to rebuild America."

*Nicholas Johnson, Federal Communications Commissioner, Testimony to the United States Senate Subcommittee on Communications*, (1969)

Emphasis supplied by Petitioner

## JOINT APPENDIX OF THE FEDERAL COMMUNICATIONS COMMISSION

The Commission has long held that its function is not to judge the merit wisdom or accuracy of any broadcast discussion or commentary but to insure that *all viewpoints* are given fair and *equal opportunity for expression* and that controverted allegations are balanced by the presentation of opposing viewpoints. *Any other position would stifle discussion and destroy broadcasting as a medium of free speech * * * More often that (sic) not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.*

**Joint Appendix 69** cited favorably ("The Commission declared that its historic policy *in conformity with Congressional authority precluded censorship of programs*") by Judge BURGER in *Anti-Defamation League of B'Nai B'rith, PAC. S.W. R. O. v. F.C.C.*, 403 F.2d 169 (1968) at 170-171

* * * * * * *

Nevertheless these subjects will and must be discussed. But they cannot be freely discussed if there is to be an official ban on the utterance of "falsehood" or an "appeal to prejudice" as officially defined. *All that the government can properly do, consistently with the right of free speech, is to demand that the opportunity be kept open for the presentation of all viewpoints.* Yet this would be impossible under the rule espoused by the ADL. The present case illustrates the matter. The assailed commentator here does not ostensibly attack the Jews as a religious group, but does attack Zionists and the ADL because the latter is conducting a campaign against "right wing extremists," which is said to include that commentator. But if anyone is permitted to express views favorable to Zionism or the ADL, or unfavorable to "right wing extremists" or the assailed commentator, then the Fairness doctrine requires that someone representing the contrary viewpoints be given the opportunity to reply. This, of course, is precisely what the ADL contends cannot be permitted. If what the ADL calls "appeals to racial or religious prejudice" is to be classed with hard-core obscenity, then it has no right to be heard on the air, and the only views which are entitled to be broadcast on matters of concern to the ADL are those

which the ADL holds or finds acceptable. *This is irreconcilable with* either the Fairness doctrine or *the right of free speech.*

**Talk of "responsibility" of a broadcaster in this connection is simply *a euphemism for self-censorship.* It is *an attempt to shift the onus of action against speech* from the Commission to the broadcaster, but it seeks *the same result -- suppression of certain views and arguments.*** Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air. *So this formulation does not advance the argument either constitutionally, ideologically or practically.* **Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government.** *Smith v. [People of State of] California*, 361 U.S. 147 [80 S.Ct 215, 4 L.Ed.2d 205] (1959); *Bantam Books v. Sullivan*, 372 U.S. 58 [83 S.Ct. 631, 9 L.Ed.2d 584] (1963); *Washington Post v. Keogh*, 125 U.S. App.D.C. 32, 365 F.2d 965 (1966), *cert. denied*, 385 U.S. 1011 [87 S.Ct. 708, 17 L.Ed.2d 548] (1967).

FCC Commissioner Loevinger, **Joint Appendix** at 143-145 cited favorably as **"basic propositions which seem to us unanswerable"** by then Circuit Judge BURGER, Senior Circuit Judge WILBUR K. MILLER and Circuit Judge J. SKELLY WRIGHT in *idem*, 403 F.2d 169 (1968) at 172

*For the FCC to promulgate rules regarding permissible and impermissible speech* relating to religion *would be not only an egregious interference with free speech in broadcasting,* but also an unconstitutional infraction of the free exercise clause and the establishment clause of the First Amendment.

**FCC Commissioner Loevinger,**
**Joint Appendix** at 143-145 cited favorably by Judge BURGER in *idem.*, 403 F.2d 169 (1968) at 171-172

{Italics and emphasis supplied.}

## APPENDIX K: CONTENT OF *CENSORED* FORBES' AD THE KHOG DEFENDANTS CLAIM WAS "INDECENT"

Audio & Video:

**[1] "When you spread your hands *to pray,* I will hide my eyes from you; Yea, when you make many prayers, I will not hear: [For] Your hands are full of blood!" Isaiah 1:15**

**[2] "God who gave us life also gave us our rights." Thomas Jefferson warned us: "God who gave us life gave us liberty. Can the liberty of a nation be secure when we have removed a conviction that these liberties are a gift of God? Indeed *I tremble for my country when I reflect that God is just, that his justice cannot sleep forever.*"**

**Thomas Jefferson,**
***Notes on the State of Virginia*, (1781-1785)**

Tag Lines

[3] Vote for someone you can trust *for a change!* Vote for Ralph Forbes, our Independent Candidate for U.S. Congress.

[4] Political ad paid for by Forbes for US. Ralph Forbes, Independent Candidate.

Video: In addition to the audio/video text, the video portion of the ad showed: [1] a brief ten (10) second montage of "bloody" hands "washing" in a bowl of pizza sauce, with the words "Jobs! Crime! Health costs! AIDS!" scrolling over, to represent a visual illustration of Forbes' views of the spiritual state of the nation condemned by God through the prophet Isaiah, interspersed with three (3) transient one (1) second flashes of aborted fetuses copied from FCC-*approved* (*Bailey*) visual scenes;* followed by [2] a picture of Jefferson; [3] and required video of Forbes over tags.

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*These *three* fleeting, *less than one-second* images were but a tiny fraction of the FCC-assented footage; and *less* than 10% of the censored Forbes' 30 second spot ad.

## APPENDIX L: FORBES' INITIAL REQUEST TO AETN DEFENDANTS

**FORBES FOR US**
**☆ Box 88 ☆**
**☆ London, AR 72847 ☆**

501/293-4641

August 24, 1992

**Ms. Susan Howarth**
**AETN, President**
**Box 100**
**Conway, AR 72032**

Dear Ms. Howarth,

Thank you for fulfilling your civic duty by scheduling a debate between the candidate for the office of House of Representatives from the 3rd District of Arkansas.

This is to notify you that I am the certified Independent Candidate for this office, and I am respectfully requesting that I be included on equal terms with my two opponents in this debate.

Because I am a candidate for change, in the past I have experienced some shameful violations of my rights, including party bosses refusing to certify my nomination after I won a statewide primary election by 63% fair and square; being forced into a run-off after I won 53% of the total vote in a 3-way statewide primary in which I carried 72 of Arkansas' 75 counties. The run-off was an illegal election because more than 75% of the voting places required by law to be open were closed in the 72 counties which I carried in the primary. These are only a few of the blatant examples of discrimination, dirty politics and suppression of the democratic process in thousands of pages of court cases in state and federal courts in Arkansas.

It is my experience that the politicians, their fat cat wire pullers, and the special interests that control this state will stop at nothing, no matter how low down, filthy, disgusting and illegal, including censorship, denial of the right to vote via *affirmative action* "elections," conspiring to deny rights under color of law, *ad nauseam,* to prevent the People from replacing these crooks and their tyrannical ilk.

Ms. Howarth, I am certain that you and AETN want to do the right and fair thing by inviting me, but I am also sure you will be subjected to tremendous pressures to censor me and my ideas. This is especially undesirable as the eyes of the nation and the world will be focused on Arkansas during this presidential election with Governor Clinton being the supreme executive over the publicly owned, Arkansas Education Television Network.

Let me share some of the thoughts and words of one of my philosophical mentors that are a strong defense against those who would try to deny the people of Arkansas, especially the 3rd District, from hearing me and my ideas to help them:

"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." Thomas Jefferson, Letter to Col. Charles Yancey, Jan. 6, 1816

"Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day." Thomas Jefferson,
Letter to Du Pont de Nemours, April 24, 1816

"I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion." Thomas Jefferson,
Letter to William Charles Jarvis, Sept. 28, 1820

"Men by their constitutions are naturally divided into two parties:

(1) Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes.

(2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist: and in every one where they are free to think, speak and write, they will declare themselves." Thomas Jefferson,
Letter to Henry Lee, Aug. 10, 1824

"For here we are not afraid to follow the truth *wherever it might lead,* nor to tolerate any error *so long as reason is left to combat it.*"
Thomas Jefferson

"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter."
Thomas Jefferson, Letter to Col. Edward Carrington, Jan. 16, 1787

"God who gave us life gave us liberty. Can the liberty of a nation be secure when we have removed a conviction that these liberties are a gift of God?

Indeed I tremble for my country when I reflect that God is just, that his justice cannot sleep forever."
Thomas Jefferson, *Notes on the State of Virginia,* (1781-1785)

"I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."
Thomas Jefferson, Letter to Dr. Benjamin Rush, Sept. 23, 1800

The wording of *47 USC 315* is so plain and simple that every ordinary American with the common sense God gave him or her knows what it says and that it means I have a right to appear and they have a right to hear me so they can make an intelligent, informed choice when they vote.

"I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments *of those in power* than by violent and sudden usurpations."
James Madison,
Speech in the Virginia Convention, June 16, 1788

Unfortunately, in 1983 some lawyers and bureaucrats arbitrarily, misinterpreted the exemption provisions, so that *a la 1984*'s "*Ministry of Truth*" the law means exactly the opposite of what it says:

"Affording equal access to all candidates," according to these worm-tongued, truth-twisters, "means that those in power may exclude and discriminate against candidates of genuine change."

But double-minded Orwellian double-speak and double-think is, alas, all too common in the Alice in Wonderland created by the politicians and special interest lawyers who run this country as if they were the Mad Hatter, the March Hare and the Queen of Hearts.

To deny anyone equal access is discriminatory and wrong, isn't this true?

To suppress any ideas or censor anyone's expression of opinion is a violation of Free Speech, which I am sure you would not allow to happen.

Ms. Howarth, I would appreciate receiving your reply to my request for equal opportunity and free speech as soon as possible.

Because if the dirty politics I have fought in the past is still doing "bidnis" as usual and if they have the power to pressure AETN to deny me and the people of Arkansas our rights, *then I must have sufficient time to exhaust my "administrative remedies," so I can get an appropriate order from a federal court in time so the people can hear me before the election is over.*

Yours for A Free and Equal Opportunity America,

s/ Ralph P. Forbes
Ralph P. Forbes

CC:

**VOTE FOR SOMEONE YOU CAN TRUST**
***FOR A CHANGE***

## Appendix M: Forbes' First Appeal To The FCC & First Denial by the FCC

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT, FORT SMITH DIVISION**

RALPH P. FORBES AND THE PEOPLE

**EMERGENCY**

- VS -

**CIVIL RIGHTS**

THE ARROGANT ORWELLIAN BUREAUCRATS OF AETN;
THE CROOKED LYING POLITICIANS;

**CLASS ACTION**

**CIVIL ACTION**

THE SPECIAL INTERESTS;

**NO. 92-2190**

INCLUDING CERTAIN MEDIA "PERSONALITIES" WHO HAVE SOLD OUT THE PEOPLE AND BETRAYED THE ETHICS AND PRINCIPLES OF PROFESSIONAL JOURNALISM;
AND GOVERNOR CLINTON OF THE STATE OF ARKANSAS; DEFENDANTS

**MOTION FOR EMERGENCY TRO WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF BY TEMPORARY RESTRAINING ORDER PRIOR TO OCTOBER 22ND, 1992, TO PROTECT THE INTEGRITY OF THE ELECTORAL PROCESS IN ARKANSAS**

* * *

4. Defendant Howarth denied Forbes his right to be included in a letter dated September 4th, 1992. [Plaintiffs' #4]

5. On September 9th, 1992, at approximately 1:15 p.m., Candidate Forbes called the Federal Communications Commission aka FCC's political branch at 202/632-7586. After waiting on "hold," a receptionist said she was connecting Forbes with "Mr. Gross' office." Forbes then stated his case to the person he was connected to at the FCC's bureaucracy. Forbes said he believed the people had a right to hear him and he

had a right to speak and be heard. Forbes said he was aware of FCC rulings circa 1986 that reversed the long standing rule that *station sponsored, staged "debates" were not bona fide news events.* Forbes stated that he did not agree with the administrative rule taking power and rights from the people, but even *if* it were permissible for a commercial broadcaster to get away with excluding candidates, *this case was different because* ***AETN is a public broadcaster owned by the people of Arkansas.***

The FCC bureaucrat told Forbes he did not care because he believed all broadcasters had the power to exclude anyone they wanted to suppress, and the FCC was not sympathetic to anyone who felt they were being treated unfairly. He said they get many such complaints every election and they turn them all down. He advised Forbes to "just take it and forget it about it," because his complaints and appeals to the FCC were "only a waste of everybody's' time."

Forbes replied that he felt strongly that the airwaves belong to the people, not the bureaucrats nor the special interests, and that he wanted to challenge the FCC ruling in court.

The FCC bureaucrat told Forbes he was wasting his time because his request for bureaucratic action by the FCC wouldn't get to first base until long after the debate was over, and that the election would be history long before Forbes could ever had his case turned down, appealed, reviewed, turned down, etc. through a long cycle of rubber stamp decisions. He said candidates all over the country complain that exclusion and discrimination is unfair; they "eventually respond to all complaints," but the FCC has only three lawyers to handle these complaints and it would likely be months before they would officially notify Forbes of their first denial.

Forbes then asked the bureaucrat for an immediate ultimate denial so that he could have it as something tangible to take to court to vindicate his and the people's rights.

The bureaucrat replied that even though all of the denials would be cut and dried at every step of the process, and

even though all of Forbes' appeals through the FCC's bureaucratic red tape would be a futile waste of time and effort, he told Forbes he still had to go through the motions.

Forbes repeated his demand that the FCC order AETN to afford him equal opportunities. Forbes also asked the bureaucrat what his name was. The bureaucrat refused to tell his name and told Forbes his name "doesn't make any difference, because you can't win."

Whereupon, Forbes wrote a letter to Mr. Milton Gross, chairman of the FCC, again repeating his request for a speedy denial because **Justice Delayed *Is Justice Denied!***
[Plaintiffs' #5]

6. Mr. Gross wrote a letter to Forbes stating it must have been someone else to whom Forbes spoke at the FCC.
[Plaintiffs' #6]

7. As of this date Candidate Forbes has heard nothing further from the FCC and AETN is hardening its resolve to deny the people their right to hear Forbes, and the plaintiff knows of no other adequate remedy under law other than to appeal to this court for injunctive relief.

**"WHEREVER LAW ENDS, *TYRANNY BEGINS.*"**
John Locke, *Second Treatise of Government,* Sec. 202 (1690)

8. Defendant Amy Oliver is reported in the press as saying the reason AETN denied the people their right to hear Forbes is because AETN decided that Forbes was "not a serious candidate." [Copy of news report, Plaintiffs' #7]

9. Nowhere is there a requirement that a candidate must be "serious" to enjoy equal rights. The definition of "serious" is so vague and broad and incapable of certainty as to be *prima facie* unconstitutional, and unconstitutionally irrational, capricious, arbitrary and malicious as applied to Plaintiff by Defendant AETN.

This law suit, the effort to overcome the state's uncon-

stitutionally burdensome restrictions to gain ballot access, the around the clock work schedules, the travel, the grueling campaigning, the expenses, *ad infinitum,* are all evidence that Candidate Forbes is serious, and that's *the real reason* the Defendants are seeking to exclude him and deny the people their right to hear serious Candidate Forbes and his serious ideas.

Plaintiffs respectfully remind the Court: THE PEOPLE of Arkansas expressed their will and intent by doing the almost impossible task of qualifying Ralph Forbes as the only Independent candidate for the office of Representative from Arkansas' third district to the Congress of the United States.

In 1986 Forbes won 63% of the vote in a statewide primary. In 1990 Forbes won 53% of the statewide vote in a 3-way race, carrying 72 of Arkansas' 75 counties and all 16 counties of the 3rd district by absolute majorities.

[Copies of letters from the erstwhile heads of both the Democratic and Republican parties of Arkansas showing that *they consider Forbes to be a serious candidate with worthwhile ideas that must be respected and who has a strong grass roots support among the ordinary people of Arkansas,* Plaintiffs' #s 8 & 9].

## Appendix N: FORBES' SECOND APPEAL TO FCC TO ESCAPE EXERCISE IN FUTILITY

**FORBES FOR US**
**☆ Box 88 ☆**
**☆ London, AR 72847 ☆**

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**501/293-4641**

**Mr. Milton Gross**
**FCC Federal Communications Commission**
**2025 M St NW #8202**
**Washington, DC 20554**

Mr. Gross,

As per our phone call* I strongly object to AETN's decision to deny the people of Arkansas their right to be fully informed and hear the views of all candidates for U.S. Congress.

**It Was The People, *Not The Greenback Dollar,*** nor the party bosses, nor the "bidness as usual" fat cats, who put me on the ballot. It is the People who own the airwaves and the "public" broadcasting station in particular, so it is ludicrous that the Clinton administration would attempt to censor the only populist candidate and deny the people their right to hear him.

I understand that the FCC is not sympathetic to my appeal, and that I will be "lucky" to get a "staff denial" before the debate; and I also understand, from what you told me, that I will be turned down every step of the way, so that by the time I ever get into a higher court the debate and the election will be long over.

**"JUSTICE DELAYED IS *JUSTICE DENIED!*"**

So, I am requesting that if all my appeals to the FCC are merely going to be rubber-stamped denials, that [A] you simply deny my all my administrative appeals forthwith, so that I can take my complaint to the federal courts as soon as possible;

Or, [B] in the alternative, please send me a reply immediately stating that I have no hope of administrative relief but that the soonest the FCC can officially notify me that you have denied my request will be by [ __/__/__ ] such and such a date, and that I probably will not exhaust my administrative remedies until [__/__/__ ] such and such a date.

Yours truly,
s/ Ralph P. Forbes
Ralph P. Forbes

*Even though the person I spoke with wouldn't tell me his name, I believe it was Mr. Gross to whom I was connected with and spoke to about this matter.

cc:

**VOTE FOR SOMEONE YOU CAN TRUST**
***FOR A CHANGE***

---

## APPENDIX O

**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

SEP 28 1992

IN REPLY REFER TO:
1800C3
92090605

Mr. Ralph P. Forbes
FORBES FOR US
Box 88
London, AR 72847

Dear Mr. Forbes:

This refers to your undated letter received on September 21, 1992. I should first point out that none of the attorneys in the branch recall any telephone conversation with you. In any event we routinely identify ourselves when speaking to callers. You may have spoken to one of the summer interns, who are no longer with us.

The nature of your complaint is not clear from your letter. For your information, however, all legally qualified candidates for federal office have a right of access to broadcast stations. Commercials stations are not required to give free time. The burden of proof is on the candidate to show that he or she is legally qualified.

Enclosed is our political package which explains the political laws and describes how to file a complaint. You will note that a candidate must include all information necessary to support a complaint. Of particular relevance is the requirement that a complaint first must be made to a specific broadcaster.

If after contacting the broadcast station you still wish to file a complaint, you should follow the procedures set forth in the enclosure, and we will give any complaint filed appropriate consideration.

Sincerely,

s/ Milton O. Gross
Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Enclosure

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There were *no enclosures* included, nor mailed separately. *cf.* p. 69 a.

## APPENDIX P: FORBES' NOVEMBER 2, 1992, LETTER TO FCC COMPLAINING OF KHOG DEFENDANT'S CENSORSHIP OF ADS

**FORBES FOR US**
☆ Box 88 ☆
☆ London, AR 72847 ☆

501/293-4641

**Mr. Milton Gross**
**FCC Federal Communications Commission**
**2025 M St NW #8202**
**Washington, DC**

November 2, 1992

Mr. Gross,

On Friday, October 30th, 1992, at the close of the business day, Mr. Darrell Cunningham arbitrarily, invidiously and wrongly censored and refused my political spots and refused to run them during the contracted times on the two channels he controls; KHBS TV Ch. 40 UHF, Fort Smith, Arkansas and KHOG TV Ch. 29 UHF, Fayetteville, AR.

These ads included some of the footage approved in the Michael Bailey hearings, FCC 8210-AJZ/MJM of 21 Aug. 1992, et seq.

These ads include only portions of the approved Bailey footage.

They contain NO sexual parts, activities, etc.

All of this and more was respectfully explained to Mr. Cunningham.

His capricious, malicious and unlawful decision has caused irreparable harm to the public who have an inherent right to Freedom of Information and to cast a ballot based upon informed consent and to my candidacy for U.S. Congress.

Therefore, I believe it is appropriate that the license to operate for the above two ABC affiliates be suspended or revoked at least until such time as they have responsible management and ownership.

Yours truly,

s/ Ralph P. Forbes

Ralph P. Forbes

cc:

**VOTE FOR SOMEONE ~~YOU~~ CAN TRUST**
***FOR A CHANGE***

## APPENDIX Q: FORBES' JUNE 28, 1994, LETTER TO FCC COMPLAINING OF KHOG DEFENDANT'S CENSORSHIP OF ADS

**Ralph P. Forbes**
**Box 88**
**London, AR 72847**

June 28, 1994

**Mr. Milton O. Gross, Chief**
**Political Programming Branch**
**Enforcement Division/ Mass Media Bureau**
**2025 M St NW 8202 ( 1919 M St NW)**
**Wash DC 20554**

RE: 93-1031WAFS in The Eighth Circuit Court of Appeal

Dear Mr. Gross,

This is to request information on the status of my complaints against several licensees (AETN Conway, AR; KHBS TV40 Ft. Smith, AR; KHOG TV29UHF Fayetteville, AR; KPOM TV Ft. Smith, AR & KFAA, Rogers, AR) regulated by the FCC for violations of my rights expressly protected by the 1st & 14th Amendments to the U.S. Constitution; *47 USC 312 & 315* and other laws, case laws and FCC regulations, such as *CBS, Inc.*, 453 U.S. 367 (19810; 68 FCC 2nd 1079, 1090, 1091 (1978); FCC letter 8210-AJZ/MJM; et seq.

In particular, I direct your attention to my letter of November 2nd, 1992, copy attached. As of this date I have heard nothing from your office in response to this serious complaint.

Sincerely,
s/RPF
Ralph P. Forbes

cc: Clerk of 8th Circuit; Mr. C. Grey Pash; Ms. Renee Licht; Mr. Tom Gay; Mr. James P. Mercurio; Mr. Robert L. Jones III; Ms. Rita Spillenger, ACLU; etc.

## APPENDIX R

**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

JUL 19 1994

IN REPLY REFER TO:
1800C3-B
94070038

Ralph P. Forbes
Box 88
London, AR 72847

Dear Mr. Forbes:

This refers to your letter received by the Commission on July 5, 1994. You request information about the status of a pending complaint dated November 2, 1992, which you claim was sent to the Commission. You enclosed a copy of that complaint.

We have reviewed our records and can find no letters from you during the proximate period following November 2, 1992. We did locate, however, an undated letter from you received by the Commission on September 21, 1992, to which we responded on September 23, 1992, For your convenience, we have enclosed that correspondence. As our letter noted, it was unclear from your September 21, 1992, correspondence precisely what the nature of your complaint was. With reference to your November 2, 1992, letter, you claim that your political advertisments(sic) were censored because two Arkansas television broadcast stations (KHBS, Ft. Smith and KHOG, Fayetteville) refused to air them as scheduled prior to the November 1992, elections. Although you do not specifically describe your spots, you indicate that they contained some of the same footage depicted in the spots of Michael Bailey, a candidate for Congress in the November 1992 Indiana elections. Mr. Bailey's spots have been the subject of other complaints related to their graphic, abortion-related content.

On October 30, 1992, in response to concerns about the effects political advertising depicting graphic, abortion-related material may have on children, the Commission issued a 'Public Notice/Request for Comments," a copy of which is enclosed. This document initiated an inquiry regarding the appropriate treatment of political advertisements featuring abortion footage, aborted fetuses, or other such material. The Notice sought comment on what right or obligation a station has to channel to the "safe harbor" hours for indecent programming (currently 8:00 p.m. to 6 .00 a.m.) political advertisements it reasonably and in good faith believes are indecent or otherwise harmful to children. The Commission indicated that until a decision is reached, broadcasters may channel to the safe harbor hours political advertisements which they believe to be indecent.

Until the Commission issues its decision on the matters raised in the Notice, we are holding in abeyance all the complaints in this area which we have received from a number of candidates in various jurisdictions. If you would provide additional information about the circumstances involved in your complaint, we will consider your concerns as soon as the Commission releases its decision on the issues raised by the Notice. Specifically, you must furnish a description of the schedules of time purchased at each station, the actual placement of each spot, and the explanation each station gave you for refusing to broadcast your spots as scheduled. You should also provide a tape or transcript of each spot, if available.

Sincerely,
s/ Milton O. Gross
Milton O. Gross
Chief, Political Programming Branch
Enforcement Division
Mass Media Bureau

Enclosure

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Again, there were *no enclosures* included, nor mailed separately. *cf.* p. 64 a.

## APPENDIX S: PERTINENT PARTS OF CANDIDATE FORBES' LETTER OF ACKNOWLEDGMENT & AFFIDAVIT TO THE ARKANSAS SECRETARY OF STATE

**FORBES FOR CONGRESS**
**Box 88**
**London, AR 72847**

July 21st, 1992

**Hon. W.J. "Bill" McCuen**
**Secretary of State**
**State Capitol**
**Little Rock, AR 72201-1094**

Dear Secretary McCuen,

* * *

Secretary McCuen, also I believe you should be aware of "Unwarranted Restrictions" in violation of the constitutional protections for the people to procure petitions. ...

... I found the level of opposition by entrenched special interests and some officious bullies in positions of power to be even more oppressive.

In particular, I want to officially notify the State of Arkansas of an incident that happened on July 14 in Rogers, Arkansas. More than 90% of people qualified to sign my petitions signed them...

Again, at least 90% of the qualified voters signed my petitions. On this occasion I met five voters who said they were already committed to Hutchinson, but three of these persons signed my petitions because they believed I should have the right to run and they wanted to have more choices on the ballot. Two of them were very hostile, especially because I was collecting signatures in Benton County. Shortly thereafter, *a policeman approached me and told me I had to stop collecting petitions.* I respectfully told him that both the United States and Arkansas Constitutions protected my right to petition and run for office. He said that didn't matter in Benton Coun-

ty. I then respectfully asked him to look at copies of two U.S. Supreme Court cases decided on June 26, 1992, #s 91-155 & 91-339. These cases upheld the rights of members of the Hare Krishna sect to exercise rights protected by the 1st amendment in airport shopping malls, parking areas, hallways, etc. I explained I was NOT a hare krishna, I didn't particularly care for them, etc.; *but that I have Rights at least equal to them or anyone else!*

*He said he didn't care because Rogers and Benton County had laws against what I was doing* and he would run them or anyone else out of town just as fast as was running me out. Because it would be impossible for me to meet the July 18th deadline if I was in jail, I had no choice but to leave and go back to Washington County to continue collecting petitions.

This is especially onerous to me, because in 1986 and 1990 the most basic rights to vote, etc. were denied to me and tens of thousands who voted for me by a small clique of professional politicians who controlled the Republican party. You may recall the most recent example, when I was forced into a run-off by the mysterious discovery of bloc votes the day after the preferential primary. When these party bosses decided all of their money and dirty tricks would not be enough to defeat me, they resorted to closing down the voting places in the 72 counties I carried, and allowed hostile crossovers to vote against me.

Secretary McCuen, I know you agree this is a free country based on law, laws made and enforced in pursuance of the Constitution, and I don't believe you would ever tolerate such un-American police state violations of basic rights; but I believe you and other constitutional officers should be aware of the constitutionally "Unwarranted Restrictions" ordinary people have to overcome to exercise our most sacred, fundamental and basic rights. ...

Sincerely,
s/ Ralph P. Forbes
Ralph P. Forbes

Enc. Copy of Amended "Receipt for Initiative Petitions"

## APPENDIX T-1: PERTINENT PARTS OF AVERRED AND VERIFIED COMPLAINT

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT, FORT SMITH DIVISION**

RALPH P. FORBES AND THE PEOPLE — EMERGENCY CIVIL RIGHTS CLASS ACTION CIVIL ACTION NO. 92-2190

- VS -

THE CROOKED LYING POLITICIANS;

THE ORWELLIAN BUREAUCRATS OF AETN;

THE SPECIAL INTERESTS;

CERTAIN MEDIA "PERSONALITIES" WHO HAVE SOLD OUT THE PEOPLE AND BETRAYED THE ETHICS AND PRINCIPLES OF PROFESSIONAL JOURNALISM;

AND GOVERNOR CLINTON OF THE STATE OF ARKANSAS;

DEFENDANTS

**ALL OF WHOM, JOINTLY, AND/OR SEVERALLY, BY SINS OF OMISSION OR COMMISSION, HAVE CONSPIRED AGAINST THE PEOPLE TO DENY THEM THEIR RIGHT TO KNOW AND TO ROB AND DEFRAUD THE PEOPLE OF THEIR BIRTHRIGHT TO ELECT REPRESENTATIVES OF THEIR OWN CHOICE**

**WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF BY TEMPORARY RESTRAINING ORDER and DECLARATION OF RIGHTS PRIOR TO OCTOBER 22nd, 1922**

* * *

THE DEFENDANTS HAVE CONSPIRED, jointly and severally, to Violate the Constitutions and laws of the United States and of the State of Arkansas, respectively, and to

transgress the rights of the people and destroy their right to free and independent self-government by denying the people their most fundamental rights to be informed and to vote effectively for their own enlightened self interests;

The defendants have conspired under color of law to deprive the people of their rights in numerous ways in a continuing defiance of the People, Law, Justice and Rights.

Defendant AETN is currently staging a so-called congressional "debate" that they plan to broadcast on October 22nd at 7:00 p.m., in which they are unconstitutionally and unlawfully excluding Independent Candidate Ralph P. Forbes that requires an immediate Declaration of Rights and Temporary Restraining Order to protect the people's rights, the integrity of the election and the rights of Candidate Forbes from irreparable harm as more fully shown in the separate motions and briefs.

**The Plaintiffs**

WE, THE PEOPLE, are that class of Persons, who are endowed by our Creator with certain inalienable and indefeasible Rights, in whom reside ultimate political power and sovereignty under God.

Defendants are unlawfully discriminating against that class of Citizens who petitioned to have the name of Forbes placed on the ballot as the people's Independent Candidate to represent the 3rd district in the United States Congress, and by denying equal rights to broadcasting opportunities on AETN, a television network owned by the People of Arkansas, they are trespassing against the rights of all Arkansans.

The election is approximately two weeks from the filing of this case. Plaintiff Forbes is campaigning night and day. But the blatant transgression against the people and Forbes by AETN has left Plaintiff Forbes no option but to turn to this court to protect his rights, the rights of the voters and the integrity of the electoral process.

**BRIEF STATEMENT OF THE CASE**

This case arises because of a systematic and general conspiracy by the Defendants, under color of law, to deny the Plaintiffs and all American Citizens their basic Constitutional Rights by unlawfully changing this constitutional Republic of Law into a soviet-like dictatorship in which party bosses, bureaucrats, and powerful special interests shall alone have the power to decide who may or may not run for elective office; and to deny the American People their fundamental Rights protected by the First Amendment by censoring ideas and opinions that do not conform their own plans for post-American "new world order."

The Defendants have continuously conspired to deprive the American People in general, the Voters of Arkansas and the third district, in particular, and the Plaintiff-in-chief, Independent Candidate Ralph Forbes of their most basic political Rights secured by the First Amendment to the United States, as more fully shown in this Complaint.

## BRIEF STATEMENT OF THE FACTS

1. The people and Ralph Forbes have had their rights flagrantly and blatantly violated in a continuing pattern of abuse under color of law for many years.

2. In 1990 Forbes won 53% of the statewide vote in a 3-way race, carrying 72 of Arkansas' 75 counties and all 16 counties of the 3rd district by absolute majorities.

3. Certain of the defendants conspired against the people by wholesale bartering of bloc votes in Pulaski County and elsewhere to prevent the maverick populist Tommy Robinson off of the gubernatorial ballot. This same vote tampering forced Forbes into an unnecessary runoff election.

4. The runoff election was an avalanche of dirty tricks and violations of law, including certain of the defendants paying certain operatives thousands of dollars to wage a war of dirty tricks, lies, physical attacks against Forbes and to violate his rights and the rights of the voters by any means to prevent Forbes' election.

## UNLAWFUL SELECTIVE AND DISCRIMINATORY CLOSING DOWN OF PRO-FORBES POLLING PLACES

5. When it appeared that all their attacks were backfiring and Forbes would be elected certain of the defendants systematically and selectively closed down more than 75% of the polling places, required by law to be open, in the 72 counties carried by Forbes.

## VIOLATION OF EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT

6. These Defendants denied Plaintiffs and their class, the grass-roots Arkansas Voters equal access to the ballot box and right of franchise in order to impair and Plaintiffs' rights of expression and association because of Plaintiffs status as probable Voters for Forbes.

7. Defendants, acting under color of state law for all times relevant to this lawsuit, knowingly and willfully discriminated against Plaintiffs by not allowing them equal access to polling places.

8. Denying persons equal access to use public facilities due to their political beliefs or activities impairs these persons' rights of political expression and association and violates the equal protection clause of Fourteenth Amendment.

9. In 1986 Forbes won 63% of the vote in a statewide primary. Certain Defendants publicly boasted it didn't matter how the people voted, they would stop Forbes from winning.

10. Plaintiff Forbes apologizes to the court for the hasty manner in which this complaint had to be prepared, and he begs leave to amend this pleading by being more particular in the multitude of invasions of rights by the defendants and the continuing violations of *42 U.S.C. 1981*, et seq.

11. Plaintiffs have been damaged as a result of said discrimination and will be irreparably damaged if such unlawful behavior is allowed to continue and are entitled to an injunct-

ion prohibiting further unlawful actions and are entitled to damages, costs and attorney's fees.

* * *

## APPENDIX T-2: PERTINENT PARTS OF AMENDED (KHOG) COMPLAINT

18. Defendants KHBS TV and its sister affiliate KHOG TV are for profit corporations, affiliates of the American Broadcasting Company aka ABC and are licensed by the Federal Communications Commission and all conduct business throughout the State of Arkansas and the irreparable injuries against the people and plaintiff Forbes occurred with the third congressional district which lies with both the eastern and western judicial districts of Arkansas. In return for the extraordinary power, privilege and opportunity for profit temporarily bestowed upon them by the people entrusting them with a monopoly over the channel 29 and channel 40 broadcasting bands, respectively, the Defendants must comply with *Title 47 USCA, Section 315* of the United States Code which states in pertinent parts:

"... such licensee shall have no power of censorship over the material broadcast under the provisions of this section."

"Nothing in the foregoing sentence shall be construed as relieving broadcasters ... from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

19. Defendants are bound also by the Constitutions of the United States and the State of Arkansas, the Law of the Land, the lawful courts, the FCC and its rulings, including *FCC 8210-AJZ/MJM* dated 21 August 1992 and attached hereto and incorporated herein and marked as *Plaintiffs' #16.*

20. Petitioner Forbes is a candidate for United States Congress and it is a great hardship and excessive burden upon him to be forced to leave the campaign trail to write legal

pleas to protect his rights and the rights of the people.

21. It was the great and irreparable harm inflicted on the people and Candidate Forbes by AETN defendants that forced Forbes to file this complaint at this time. However, that injury by AETN is only one in "a long train of abuses and usurpations, pursuing invariably the same object (a supplanting of government by the people, of the people and for the people with government by the bureaucrats, of the politicians and for the special interests, which) evinces a design to reduce (the people) under absolute Despotism," it is the petitioner's right, it is the petitioner's duty to defend the people and their rights and to provide new Guards for their future security.

{Paraphrased from our Declaration of Independence}

22. Petitioner Forbes, who is not backed by any PACs or special interests, caused to be produced a number of television ads to attempt to communicate his messages in less than 30 seconds.

23. Forbes caused to delivered a preliminary version of the ads on 3/4" video tape to a number of commercial broadcast and cable television stations throughout the 3rd district, including KHOG TV.

24. These tapes contained the basic footage showing that aborticide kills babies, the ugly truth and fact that Forbes' political opponents do not want the American people to know.

25. At approximately 2:30 - 3 p.m. on Friday, October 30, 1992, Candidate Forbes brought a copy of the final version of his ads to KHOG affiliate in Fort Smith.

26. Forbes gave the tape to Nancy Dolan who told Forbes the station could not legally censor nor refuse his spots, but they had to check them for certain technical specifications as to timing, scan lines, etc.

27. After waiting a long period of time, during which stations KHBS/KHOG TV broadcast programs containing materials

that Forbes and millions of other Christians deem offensive, indecent, immoral and just plain garbage, at approximately 4:00 p.m. CST Defendant Cunningham asked Forbes to come into his office and close the door.

28. Defendant Cunningham then told Forbes he could not air his Pro-Life ads. Forbes protested that it was his right to run his ads. Defendant Cunningham said he had just been on the telephone with his lawyer and that the FCC had just issued a new ruling giving station management the power to relegate materials they subjectively decide as "indecent" to the "safe harbor" hours between 11:00 p.m. and 6:00 a.m.

29. Forbes then cited the facts in *FCC 8210-AJZ/MJM* of 21 August, 1992. Forbes then related that congressional candidate Michael Bailey had already had his footage showing the "products" of aborticide approved by the FCC in April and July of this year and the FCC had ruled such pictures were *not* "indecent," and that Forbes' footage was taken from the Bailey ads, but that Forbes had not included all of the footage, but only a portion of the permissible pictures. Forbes also told defendant Cunningham that similar ads had been challenged in federal courts and that the courts had ruled the spots were protected by the First Amendment. Defendant Cunningham said in effect that he did not care what the law or the courts said he was censoring and refusing Forbes' ads.

Please see Plaintiffs' attachment, Letter from Candidate Bailey plus a video copy of the Bailey ads marked as Plaintiffs' #17.

30. Defendant Cunningham said that Forbes could move his spots from the chosen time periods to the late "safe harbor" times. Forbes protested that he picked the times he bought based on reaching the largest number of potential voters and forcing him to move to the undesirable times would irreparably harm his campaign. Defendant Cunningham said that was fine by him and said he would never run Forbes' ads in the favorable time slots. Forbes refused to give up his prime spots, but bought additional "safe harbor" slots under protest.

31. Forbes immediately attempted to call the FCC in Washing-

ton DC but the telephones were not answered. Forbes repeated his efforts throughout the weekend, but the FCC was closed.

32. Friday night, October 30th, Forbes attempted to get justice by calling the clerk of court and the magistrate at the U.S. Courthouse in Fort Smith. Forbes was told no judge would be available to help him until Monday morning.

33. Forbes also called the federal court in Little Rock and eventually reached Circuit Judge Morris Arnold who was working after hours. Judge Arnold is an appellate judge and has no authority to issue injunctive relief in the first instance.

34. Saturday morning Forbes reached Indiana congressional candidate Michael Bailey. Bailey told Forbes that the FCC ruling did not apply to Forbes' Pro-Life ads, but that someone issued a misleading interpretation at the close of business hours and that apparently TV stations all over the country were given information they could use as a pretext to censor all Pro-Life ads during the final critical hours of the campaign because it would be at least late Monday before the mess could be corrected; and by then it would be too late and the harm to Pro-Life candidates nationwide would be irreparable. However, as station management was notified of the facts they decided the Pro-Life spots could not be censored, denied or "moved to the back of the 'prime time' bus." These stations include WAVE and WHAS 11 in Louisville/Cincinnati; the Denver stations, etc.

Please see Plaintiffs' attachment, newspaper article from page 4A of Sunday's, (November 1st) Arkansas Democrat Gazette marked as Plaintiffs' #18.

Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment to the United States Constitution

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws.
Fourteenth Amendment to the United States Constitution

Candidate Forbes, has an equal right to accommodations, rights and privileges secured under the 14th Amendment to the United States Constitution and the Constitution of Arkansas as any other Citizen.

35. Plaintiff Forbes has suffered irreparable harm because of the unlawful, wicked, selective and invidious decision of KHBS defendants.

36. The most fundamental rights of the People to choose their own representatives based on informed consent have been flagrantly trespassed by the KHBS defendants.

This Complaint embraces and must comprehend a long string of abuses and pattern of continuing conspiracy against the people and their rights. The instant case against KHBS TV, et al, as more fully shown is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their informed consent. And, therefore, Petitioner Forbes requires at least thirty (30) days past the election of November 3rd to adequately prepare his pleadings and he stipulates that no defendant is required to answer the complaint until after they have received the fully amended pleadings;

* * *

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
in propia persona,
Box 88, London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this s/ 2 Day of Nov, 1992. My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, s/ Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this s/ 2nd Day of November, 1992, by hand or by U.S. mails as appropriate:

ABC; KHOG TV & KHBS TV
c/o Mr. Darrel Cunningham
Box 4150
Ft. Smith, AR 72914
501/783-4040

American Broadcasting Company
1330 Avenue of Americas
New York, NY 10019

Ms. Susan Howarth, Executive Director
AETN
350 S. Donaghey
Conway, AR 72032
501/682-4118 or 501/450-1727

Attorney General Winston Bryant
200 Tower Building
323 Center St.
Little Rock, AR 72201